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CURRENT TOPICS.

The Supreme Court of Ohio, in *Lawrence v. Belger*, 31 Ohio, 179, hold, following Sellers v. Corwin, 5 Ohio, 378, that a judgment rendered in the Circuit Court of the United States has the same lien on the lands of the debtor within the district that is given to a judgment of the state court within the limits of its territorial jurisdiction. The doctrine of this case, said the court, is, that inasmuch as the execution laws of the state have been adopted under and by virtue of the federal statute for the enforcement of the judgments of federal courts within the state, the same lien declared by the statute of the state in favor of the judgments of state courts attaches to the judgments of federal courts, on lands within the district. And this doctrine is analogous to that of the English courts, which holds that a lien is created in favor of a judgment, by virtue of the statute which authorizes a moiety of the debtor's land, by a writ of *elegit*, to be delivered to the creditor, until his claim is satisfied out of the rents and profits. The same doctrine has been held in several cases decided by the courts of the United States, as well also as by those of several of our sister states. Shrew v. Jones, 2 McLean, 78; Massingell v. Downs, 7 Howard, 760; Williams v. Benedict, 8 Howard, 107; Cropsey v. Crandall, 2 Blackf. 430; Brown v. Pierce, 7 Wallace, 205. See, also, Provost v. Gorrell, 6 Cent. L. J. 261.

In *Harrison v. Collins*, 35 Leg. Int. 202, recently decided by the Supreme Court of Pennsylvania, the action was brought for injuries received by the plaintiff, by falling through a coal hole of the defendant's, placed in the sidewalk. The important question in the case was the liability of the owners and occupiers of the building for the act of a person employed by them, in leaving the coal hole open. The defendants had employed a person to transport certain articles from the cars to their building, in doing which he uncovered the coal hole and left it open, and the plaintiff was thereby injured. The court held that if the employee was to be considered as the agent or servant of the defendants, they would be liable, but if his employment was found to be an independent one, and the defendants had no expectation or knowledge that the hole would be uncovered during the work, they would not be liable. This distinction has been recognized in numerous cases. Among others may be cited Painter v. The Mayor, &c., of Pittsburg, 10 Wright, 213; Hunt v. Penna. R. R. Co. 1 P. F. Smith, 475; Allen v. Willard, 7 Id. 374. It is well settled in England and in this country, that persons not personally interfering or giving directions respecting the manner of work, but contracting with a third person to do it, are not responsible for a wrongful or negligent act in the performance of the contract, if the act agreed to be done is legal. Gray and wife v. Pullen, 32 L. J. R. (N. S.) 169; Hillard v. Richardson, 3 Gray, 349; Blake v. Ferris, 1 Seld. 48; Painter v. The Mayor, &c., *surpra*. The fact that the contractor is paid by the day does not necessarily destroy the independent character of an employment. Forsyth v. Hooper, 11 Allen, 419; Corbin v. America Mills, 27 Conn. 274. If one renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment. Shearman & Redfield on Neg., sec. 74; Pack v. The Mayor of New York, 4 Seld. 222; Barry v. The City of St. Louis, 17 Mo. 121.

The Supreme Court of Pennsylvania in the late case of *Creed v. The Pennsylvania R. R.* 5 W. N. 253, held that riding in the caboose car of a train was not such contributory negligence as would prevent the person from recovering for an injury received while in such car. A similar point was raised in O'Donnell v. The Allegheny Valley R. R. 9 P. F. Smith, 239, where the court below held that the baggage car was an improper place for passengers, whether the rule of the company against such use was communicated to them or not, and that one leaving his seat in the passenger coach and entering the bagage car was guilty of negligence. But this ruling was reversed. Mr. Justice Agnew, delivering the opinion of the court, observed, that whilst it is the un-

doubted right of a railroad company to prescribe reasonable rules for the regulation of those who travel on its cars, yet the conductor is the one who is charged with their administration, and his permission of, or acquiescence in, the use of the baggage car by a passenger exempts such passenger from all blame, and in case of accident to him, resulting from the negligence of the company, he may recover damages. In the case of The Lackawanna & Bloomsburg Railroad Co. v. Chenewith 2 P. F. Smith, 382, the plaintiff had obtained permission from the agents of the company to attach his freight car to a passenger train contrary to the rules of the company which were communicated to him, he, at the same time, agreeing "to run all risks." Notwithstanding this it was held that the company was liable for damages resulting to the plaintiff and his car from negligence in the running of the train. And this is reasonable; for, as was said in that case, the plaintiff's car was not unlawfully upon the road, and his engagement to be responsible for all risks did not embrace such as arose from the neglect of the defend. ant's employees. In Carroll v. The New York & New Haven Railroad Co., 1 Duer, 571, at the time of the accident complained of, the plaintiff—a passenger—was in the post-office part of the baggage car; and though it was conceded that the position was more dangerous in case of collision than a seat in the passenger car, yet, being injured by a collision to which his position in no way contributed, it was held that he was entitled to recover. See also Washburn v. Nashville & Chattanooga R. R., 3 Head. (Tenn.) 638, and Jacobus v. St. Paul & Chicago R. R., 31 Leg. Int. 277.

The Supreme Judicial Court of Massachusetts holds a somewhat anomalous position in regard to the effect of Sunday laws upon the right to recover for injuries tortiously inflicted upon persons acting in violation of such laws. In the case of *Lyons v. Desotelle*, recently decided, the majority of the court, MORTON, J., delivering the opinion, say: "In an action of tort for injuries to the plaintiff's person or property, if his own illegal act or other negligence contributed to the injury, he can not recover. But he is not precluded from recovering by the fact that he is at the time doing an illegal act, if such illegal act did not contribute to his injury." This is a familiar rule of law which is recognized and applied every day. But the court goes on to say: "When a man in traveling sustains an injury from a defect in the highway, or from an accidental collision with the vehicle of another traveler, his act of traveling is necessarily a contributing cause of the injury. If the act of traveling is unlawful, then his own unlawful act is a contributing cause of his injury, and prevents his recovery." To say that the *act of traveling* is necessarily a contributing cause of the injury is losing sight entirely of the distinction between *conditions* and *causes*. "A traveler leaves home in the morning for a distant point, in reaching which by the nearest line he must cross a railroad on a level, though by making a *detour* of a mile he would cross it on a bridge. In attempting the level crossing he is struck by a locomotive engine. His leaving home in the morning is a *condition* of this collision, but not its juridical cause. So his taking the level crossing is another condition of the collision, but is not its juridical cause, if the level crossing is on a public road usually traveled." Whart. Negligence, § 303. In Marble v. Ross, decided by the same court, reported in 6 Cent. L. J. 157, the distinction was properly observed. That was an action of tort to recover for injuries inflicted by a vicious stag upon the plaintiff while passing on the defendant's land. The court there say: "The mere fact that the plaintiff was upon the defendant's land without his consent would not defeat the right of action. The unlawful character of his act did not contribute to his injury or affect the defendant's negligence." So, in Damon v. Scituate, 119 Mass. 66, which was an action against a town for an injury sustained by a defect in a highway, GRAY, C. J., says: "The mere fact that he (the plaintiff) was traveling on the wrong side of the road, in violation of the statute, did not as matter of law defeat this action, if his own fault or negligence did not contribute to the injury." And, again, in Steele v. Burkhardt. 104 Mass. 59, CHAPMAN, C. J., says: "So the evidence that the plaintiffs' team was standing in the street in violation of a city ordinance, was admissible to show negligence on their part. It did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury. And, notwithstanding this evidence, it

was competent to the arbitrator to find, as a fact, that, *towards the defendant*, the plaintiffs were guilty of no negligence, but were careful to leave him ample room to pass." Now, in each of these three last cases, the act of plaintiffs was just as much a "contributing cause" of the injury as in Lyons v. Desotelle, and the act in each case being illegal, the illegal act contributed to the injury and should have prevented a recovery, upon the reasoning of that case. The true, and, as it seems to us, the only logical rule in this class of cases, is that adopted in Sutton v. Wauwatosa, 29 Wis. 21. The plaintiff there was driving his cattle to market on Sunday, in violation of the statute, when they were injured by the breaking down of a defective bridge, which the defendant town was bound to maintain. Dixon, C. J., in delivering the opinion, uses this language: "The cases may be summed up, and the result stated generally to be the affirmance of two very just and plain principles of law, as applicable to civil actions of this nature; namely, first, that one party to the action, when called upon to answer for the consequences of his wrongful act done to the other, can not allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with or leading to or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care, or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it" If the plaintiff has traveled at a *time* prohibited by law, then, as when he has violated the statute or ordinance regulating the *mode* of his traveling, the proper officers should institute a prosecution on behalf of the state, and the defendant should not in the one case more than the other be allowed to constitute himself the guardian of public morals and vindicate the majesty of outraged law by inflicting, through his recklessness and negligence, upon the transgressor a penalty grossly disproportionate to the enormity of the offense.

THE English government has promised to shortly introduce a bill which will change, to some extent, the rule of "common employment," as laid down by the courts.

SEPARATE FELONIES — THE RULE IN STATE v. COWELL DISCUSSED.

The defendants were jointly indicted for the crime of burglary in entering the dwelling-house of one Alderson with intent to steal. Upon the trial one of the defendants, on behalf of the state, was allowed to testify that, a few days before the commission of the burglary, he and the other defendants agreed to commit a robbery on the person of said Alderson; that they did not rob him, because the witness said he had nothing to be robbed of; that the other defendants were watching Alderson on the street for that purpose: *Held*, admissible and relevant, as it tended to prove the intent of defendants at the time of the entry into the dwelling-house. *State v. Cowell*, 12 Nev. 337.

The case of *State v. Cowell* already referred to in the columns of this journal (6 Cent. L. J. 221) is the last of a line of cases in which judges seem to have striven for the practical overthrow of the well-settled rule of criminal law that the evidence must be confined to the issue.

In this case, as well as in all others of the class to which it belongs, the existence and binding force of that rule is recognized; but the judges demonstrate to their own satisfaction that it is not infringed by the introduction of evidence showing that a prisoner has committed or agreed to commit an offense unconnected with the one for which he is on trial. They shelter themselves behind the rule which forbids the exclusion of evidence, in other respects admissible, merely because it shows, or tends to show, that the prisoner's character is bad, and allows the prosecution, in certain cases, to show that the accused has committed, or agreed to commit, a crime other than the one for which he is on trial. They tell us that one of the cases in which this may be allowed, is where such evidence "tends to throw light on what were the prisoner's motives and intention in doing the act complained of," and conclude that the evidence decided to be admissible has this tendency.

Such is the position of the Supreme Court of Nevada in the case in question. Whether it be correct or incorrect we shall proceed to consider.

While the writer does not believe that courts should so closely confine the evidence to the particular transaction charged that the ends of justice will be defeated and the guilty shielded, he is far from believing that they should go to the other extreme.

The "safe middle course" should be followed. On the one hand, evidence having a legitimate tendency to show a guilty purpose

should not be excluded, and when other crimes committed by the prisoner are so closely connected with the one for which he is on trial that they can justly be said to throw light on his motives in doing the act complained of, evidence of their commission should be allowed to go to the jury. On the other hand, the dictates of justice and humanity require that the prosecution should not be allowed, by showing that the prisoner has committed a wholly disconnected offense, to induce the jury to convict him of a crime which he did not commit, because he deserves punishment for another which he did commit.

The rule is too well settled to admit of dispute that the commission of one offence cannot be given in evidence on the trial of a person for another, merely for the purpose of inducing the jury to believe that the prisoner committed one offense, because he committed one of the same nature on another occasion.

After a careful investigation of the subject the writer is forced to conclude that in the case of State v. Cowell this rule was violated.

What bearing on the question of a man's intent in entering a house has the fact that three days before such entry he agreed with others to rob the owner of the house on the street? Does it show that his intent was to steal? Decidedly not, unless the fact that a man is bad enough to steal tends to show that he entered a house for that purpose. If the evidence of the agreement to rob had no more bearing on the question of intent than this, it should not, as we have already seen, been received. Had it any more bearing? The writer thinks not, and his views are sustained by decisions of undoubted authority.

In Kinchelow v. The State, 5 Humph. (Tenn.) 9, it was held that an accomplice could not, with a view to sustain his testimony, be permitted to narrate other instances of crime proposed to him by the defendant, though made in the same conversation in which the crime charged was proposed. The court in its decision, said: "The only object of such testimony necessarily is to prejudice the minds of a jury, as it can by no possibility establish or elucidate the crime charged. We can well see how a jury who, in the case under consideration, might have unhesitatingly refused to find a verdict against the prisoner upon the evidence of the witness confined within its legitimate scope, may have been misled by the proof of the utter baseness and want of principle as detailed against him.".

In People v. Corbin, 56 N. Y. 363, it was held that upon a trial for forgery, the confession of the prisoner that he had committed other forgeries was not admissible on the question of criminal intent.

In Bonsall v. State, 35 Ind. 460, it was held that on the trial of the prisoner for a robbery committed on December 16th, it was error to allow the prosecution to show a second robbery of the prosecutor by the prisoner on the following day.

In People v. Barnes, 48 Cal. 551, it was held error for the trial court to admit evidence showing that on the night previous to that on which the burglary for which he was on trial was committed, the prisoner entered the prosecutor's room and stole a sum of money.

In Barton v. State, 18 Ohio, 221, it was held that upon the trial of the prisoner for stealing a horse, evidence that he had on the night of the day previous to that on which the horse was taken, stolen a sum of money, was inadmissible. In holding that such evidence was not admissible on the question of the prisoner's intent in taking the horse, the court say: "Although the court, in this instance, say that the evidence was only admitted for the purpose of showing the intent with which the defendant got possession of the property, yet we do not see any connection between the two transactions that would enable any legitimate conclusion to be drawn as to that fact. The only conclusion we can see that could fairly be drawn from the evidence, would be that the defendant intended to steal the horses and other property with which he was charged, because he was a thief and had just before stolen a sum of money. Each case must be tried on its own merits and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may have previously committed similar crimes. On the part of the prosecution the general bad character of the defendant cannot be proved, when *he* offers no evidence of character; much less can particular acts of his be proved of which the record gives him no notice and which he, therefore, cannot be expected to meet." See also on this point, Coleman v. People, 55 N. Y. 81; People v. Bowen. 49 Cal. 654; People v. Jones, 31 Id.

565; Farrer v. State, 2 Ohio St. 54; State v. Merrill, 2 Dev. 259; State v. Wisdom. 8 Por. (Ala.) 511; State v. Goetz, 34 Miss. 85; State v. Shuford, 69 N. C. 486; Cole v. Com. 5 Gratt. 696.

Although there is much conflict in the adjudged cases on this point, it will be found on investigation that the rule adopted by the Supreme Court of Nevada in State v. Cowell is opposed as well to the weight of American authority as to reason. S. L. T.

RESTORATION OF MORTGAGE LIEN— DISCHARGE THROUGH MISTAKE — RIGHTS UNDER SUBSEQUENT LIEN.

FRENCH v. STONE *ET AL.*

Supreme Court of Michigan, April Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" ISAAC MARSTON, }
" B. F. GRAVES, } Associate Justices.
" T. M. COOLEY, }

1. EQUITY—RE-INSTATEMENT OF LIEN DISCHARGED BY MISTAKE—SUBSEQUENT LIENS.—Where a mortgagee has discharged his mortgages of record, receiving in satisfaction a conveyance of part of the mortgaged lands, he is entitled in equity to have his mortgages re-instated as against a lien acquired on all the lands subsequent to the mortgages, and of which the mortgagee, when giving the discharge, had neither actual nor constructive notice.

2. UNDER THE MICHIGAN STATUTE the filing in the registry of deeds of a certified copy of an attachment levy on lands, is not constructive notice to third persons.

3. CREDITOR STANDS ON DEBTOR'S RIGHTS.—Until the attachment creditor makes sale on his execution and becomes the purchaser, when he may thereby acquire new equities, he stands on his debtor's rights, and his levy may be defeated by any equities which his debtor could not resist.

4. A LIEN DISCHARGED BY MISTAKE is in contemplation of equity, still in existence.

5. NO VESTED RIGHT ACQUIRED—By the discharge through mistake of a previous lien, a subsequent incumbrancer acquires no vested rights entitled to constitutional protection, so as to prevent equity from restoring the discharged lien.

6 ACCOUNTING FOR RENTS AND PROFITS—PLEADING.—The claim that a complainant seeking to have his lien so restored and foreclosure decreed, should have been required to account for rents and profits of the land he has been holding, has no force unless brought by the pleadings to the attention of the court below.

COOLEY, J., delivered the opinion of the court:

In 1867, James E. De Bow, being indebted to complainant in the sum of $1,278, executed and delivered to him, as security therefor, a mortgage of eighty acres of land in Homer, Calhoun County, and in 1868 a further indebtedness of $300 having arisen, a second mortgage was given, covering the same lands, and also certain lots in the village of Homer. These mortgages remained unpaid until March 27, 1876, when the parties entered into an arrangement, under which complainant was to take the eighty acre lot in satisfaction of his demands, and discharge the mortgages. This arrangement was carried out by the execution of the proper conveyances, and by the discharge of the mortgages of record. All this was done in the full belief on the part of complainant that the title to the lands he was thereby acquiring from De Bow was unincumbered, and not until some time in the early part of 1877 did he ascertain that defendant Stone, in the year 1870, had sued out of the Circuit Court for Calhoun County an attachment against the property of De Bow, and caused the same to be levied on the lands described in the mortgages. A certified copy of the attachment was duly filed by the sheriff in the office of the registry of deeds of the county, immediately after it was levied, but nothing further was done in the attachment suit until December, 1876, when Stone proceeded to judgment therein, and in January following caused an execution on the judgment to be levied on the same lands. When the attachment proceedings came to the knowledge of the complainant, he at once filed a bill in equity, setting forth the facts above recited, charging De Bow with fraud in procuring the discharge, praying that the discharge be set aside, and that the lien of his mortgages be restored and established as if the discharge had never been given. He also prayed for foreclosure and sale.

The case was heard on pleadings and proofs in the court below, and decree entered for complainant in accordance with the prayer of his bill. Very little controversy is made over the facts. No fraud is made out against De Bow, but it is very satisfactorily shown that complainant had no knowledge of the attachment proceedings when the discharge was given. Many objections are taken to the decree, and we shall notice all that seems to us to require special attention.

1. It is said that complainant has no equities, because, by the filing of the proper papers in the office of the register of deeds, he and all other persons were duly notified of the attachment, and he must therefore be deemed to have acted with full knowledge of the attachment lien when he gave the discharge. This objection depends for its force upon the answer to the question whether the filing of the attachment papers is constructive notice. Upon this subject the statute is silent. It provides only: "Real estate shall be bound, and the attachment shall be a lien thereon from the time when it was attached, if a certified copy of the attachment, with a description of such real estate, shall be deposited in the office of the register of deeds in the county where the same is situated, within three days after such real estate is attached, otherwise such attachment shall be a lien thereon only from the time when such certified copy shall be so deposited." Comp. L. § 6406. This does not make the copy filed notice to third parties. Columbia Bank v. Jacobs, 10 Mich. 349; and the case must consequently be disposed of on the assumption that complainant had no notice of the attachment proceedings, actual or constructive,

when the discharge of the mortgages was given.

2. Defendant Stone insists that whether the complainant had notice of the attachment or not is really immaterial in this proceeding, inasmuch as the levy of execution was made while the mortgages remained undischarged, and thereby new rights were acquired in which he is entitled to be protected as being rights superior to any which complainant can have to the restoration of a lien not in existence when the levy was made. But it was held, in Columbia Bank v. Jacobs, *supra*, that a mere levy did not give to the creditor any rights analogous to those of a *bona fide* purchaser, and the same principle has been recognized at the present term in Michigan Panelling, etc. Co. v. Parsell. The creditor, when he makes sale on his execution and becomes the purchaser, may acquire new equities; but until that time he stands on the rights of his debtors, and the levy may be defeated by equities which the debtor is unable to resist.

3. Reliance is placed on Bennett v. Nichols, 12 Mich. 22, as authority for the doctrine that equity is incompetent to create a lien upon lands. That doctrine has no application here. A lien discharged by mistake is, in contemplation of equity, still in existence, and the decree only declares and enforces it.

4. What has already been said would seem to dispose of the argument that Stone, by his levy, has acquired vested rights of which he can not be constitutionally deprived. We may concede to the fullest extent that the legislature can not take away a statutory lien (Gunn v. Barry, 15 Wall. 610), and the question only recurs whether this defendant ever had any lien as against the equities of the complainant. If he did not, then no question of vested rights is involved. It has been shown that only through mistake of fact did complainant divest himself of his own previous liens; and it is contrary to equity for defendant to attempt to take advantage of that mistake. But it has well been said that "courts do not regard rights as vested contrary to the justice and equity of the case." State v. Newark, 25 N. J. 197. Constitutional principles would be a mockery of justice if they might be seized upon to protect an accidental legal right to the destruction of substantial equities. It is a misuse of terms to call the action of the court below the depriving of this defendant of his rights; all it did or assumed to do was to adjust between these parties their respective equities, and this it did in the exercise of an undoubted jurisdiction, and without in the least venturing upon doubtful ground.

5. The decree undertook to restore the complainant to his position as mortgagee of the lands previous to the discharge being given, and a sale of the mortgaged premises was ordered to satisfy the amount due on the mortgages, unless the amount due and costs should be paid within five months. Some formal objections are made to the decree, which we think not tenable. The objection that complainant, who, for a time, had been in possession of the eighty acre lot, should have been required to account for rents and profits, might have had force if the pleadings had brought it to the attention of the court below, but they did not.

The decree should be affirmed, with cost against the appellant.

CAMPBELL, C. J., and MARSTON, J., concurred.

BANKRUPTCY.

STILLWELL v. WALKER, ASSIGNEE.

United States Circuit Court, Eastern District of Missouri, April, 1878.

Before HON. JOHN F. DILLON, Circuit Judge.

1. ON AN APPEAL BY A CREDITOR to the circuit court from the decision of the district court, rejecting his claim under section 4984, of the Revised Statutes, the case is to be reconstructed and issues made up, and the case tried in the same way as a case at law originally brought in the circuit court.

2. WHERE THE CLAIM IS BASED on a judgment of a state court, obtained against the bankrupt before bankruptcy, an answer which sets up only matters that would have constituted a defense to the original suit, but does not aver any fraud or collusion in the obtaining of the judgment, or any accident or mistake, is not good. And that, too, though the judgment was by default. The facts that S, the creditor, while an officer of the bankrupt corporation, purchased claims against it at a discount of 50 per cent, and afterwards received from the company its notes for the full face value of the claims, and, suing on the notes, obtained a judgment for their full amount, are only matters of defense to the original suit. They are no defense as against the judgment.

3. THAT ANY CLAIM OF FRAUD OR COLLUSION in the obtaining of the judgment or other equitable defense thereto, can not be set up by answer in a proceeding had under section 4984, but must be asserted by bill in an independent suit in equity by the assignee —*semble*.

Appeal from the District Court.

Dryden & Dryden for the creditor; *W. R. Walker*, *pro se*.

DILLON, Circuit Judge, orally delivering his opinion, said:

I proceed to announce my judgment in the case arising out of the bankruptcy of the State Insurance Company of Missouri, in which one A. J. Stillwell is a creditor.

This is an appeal in bankruptcy under the eighth section of the Bankrupt Act as it originally stood, now section 4984 of the Revised Statutes. Stillwell filed a claim in the bankruptcy court as a judgment creditor of the insurance company, bankrupts, on a judgment recovered in a state court of competent jurisdiction in May, 1875, for about $8,500. His claim was contested in the bankruptcy court, on the ground that at the time he purchased it he occupied a fiduciary relation to the company, and on the further ground, as appears by the pleadings in that court, that he procured the rendition of this judgment by means of fraudulent contrivances. On the pleadings thus constructed, the matter was heard in the bank-

ruptcy court, and the issue was, whether he was entitled to hold this judgment for the full amount, or for such sum only as he actually paid for the claim. The matter was decided in favor of the assignee in bankruptcy, and his claim scaled down and reduced to between four and five thousand dollars. Dissatisfied with this, he prosecuted this appeal, and in that way the case comes on at this time.

It is material to take into view, in determining the question as now presented, the provisions of the Bankrupt Act, in respect of appeals. [Here the court quoted § 4984, Rev. Stats.] The substance of that provision is, that while the case is nevertheless heard in the bankruptcy court, yet when the creditor takes an appeal from a decision in favor of an assignee and the case comes into the circuit court, it is to be there reconstructed; and the creditor is required to file a declaration at law, and the issues are then to be made up, and the case tried in the same way as a case at law originally commenced in the circuit court. Conforming to this requirement, the creditor filed his declaration in this court, which was in the usual form of an action on a judgment. To this cause of action thus stated, the assignee files his answer, to which there is a demurrer. It will be borne in mind that the judgment in question was rendered in May, 1875, and that the bankruptcy did not occur until September, 1875. In October, 1874, Mr. Stillwell, as averred in the answer, sustained toward this company this relation, namely, he was vice-president and director in the company, and member of the finance committee; and when sustaining these relations purchased claims against the company at fifty cents on the dollar—such claims arising out of losses sustained by the company which it could not pay; that the company issued to him afterwards certificates therefor, and it was on these that he recovered his judgment. The answer does not aver that he sustained this relation when the company issued to him certificates of indebtedness for one hundred cents on the dollar. The assignee claims that, although if the original claimants held these claims, they would be good for one hundred cents on the dollar, yet the creditor here—Mr. Stillwell—is limited in his recovery to the amount by him actually paid. And they issued to him certificates of indebtedness, which not being paid, he instituted suit in a court of competent jurisdiction of the state, and recovered judgment; and, although not pleaded, it is said in argument to have been a judgment by default.

Now, at this time, it is admitted he had resigned his office and was not connected with the company, and at the time he recovered his judgment was not a member of the company. This is the whole plea. It does not say that he sustained any fiduciary relation at the time he brought his suit, nor does it say this judgment was obtained by any fraudulent contrivance. Nothing of the sort. Now, I will admit that if a person sustaining a relation—as Mr. Stillwell's—to the company, purchased these claims at fifty cents on the dollar, he would be held to have purchased them as a trustee for the company, and the recovery would be limited to the amount paid. But there is another element in this case, and as it now stands a controlling element, namely: he has not presented these claims for allowance, but has instituted suit in a court of competent jurisdiction, and brought at a time when he sustained no trust relation, and that court has given him judgment for the full amount. That judgment is as good as any other, unless it can be attacked for fraud, accident or mistake. It was the duty of the company when sued, supposing they had a defense, to make it, and if they failed to make it when it was open to them, without any fraudulent contrivance or collusion on the part of the creditor, it is presumptively as valid as any other judgment. That principle has been asserted so often in the Supreme Court of the United States, that it can be open to no controversy whatever. There are three cases bearing directly on the point. For sake of brevity I quote Judge Curtis' statement of them: "A court of equity does not interfere with judgments at law, unless the complainant had an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his servant." Hendrickson v. Hinckley, 17 How. 443. "And will not relieve against a judgment at law, where the defendant had a legal defense, which he omitted to set up, and does not satisfactorily account for such omission." Tample v. Barnes, 14 How. 70. "Nor will it relieve where the defense is that the contract on which the judgment rests was made in violation of a statute." Ibid. Why? Because it was his privilege, when sued, to come into court and plead these defenses, and, if the defenses were available at law, and he does not plead them, and there has been no fraudulent collusion, that judgment is effectually an estoppel for ever between the parties.

In the case of Cromwell v. Sac County, recently decided by the Supreme court of the United States (see 4 Cent. L. J. 416), the same principle has been applied to a judgment by default; and in that case they settled a point which has been in some confusion in the books; they held that where the second suit is on the same cause of action, the judgment is not only an estoppel upon what was in litigation, but upon every thing that might have been brought in litigation. So the matter now stands. I am constrained to hold that the judgment is conclusive of the rights of these parties, unless it can be assailed or impeached for fraud, or upon some ground recognized as sufficient in a court of equity. Do you propose to amend, Mr. Walker?

Mr. Walker: Yes sir, I propose to amend.

DILLON, J.: There is another question: whether you will not be obliged, if you have a defense which is available in equity, and not at law, to attack this judgment in this court in the same manner in which you would be obliged to do if the case had been originally brought here aside from the bankruptcy to recover on a judg-

ment. And my impression is that that is the proper course, but I need not now decide the point. If you have a defense in equity, on equitable grounds, to impeach the judgment, perhaps you had better file a bill on the equity side of the court; but you can consider the question and take your own course. The answer does not set up a sufficient defense to the action on the judgment, and the demurrer thereto is sustained, with leave to the defendant to amend his answer, or to file a bill in equity as he may be advised.

ORDERED ACCORDINGLY.

LIABILITY OF MUNICIPAL CORPORATION TO OWNERS OF PROPERTY DESTROYED BY FIRE.

TAINTER v. CITY OF WORCESTER.

Supreme Judicial Court of Massachusetts, October Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" AUGUSTUS L. SOULE,
" OTIS P. LORD,

A CITY, by accepting a statute which authorizes it to make and maintain reservoirs and public hydrants "in such places as may be deemed proper," and building its works under it, does not enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires, upon which an action can be maintained.

Action of contract, with counts in tort. Trial in the Superior Court, before ALDRICH, J., who allowed a bill of exceptions substantially as follows:

The plaintiff put in evidence tending to show that she was the owner of a certain mill in the city of Worcester, which was destroyed by fire June 17, 1874; that the fire, when first discovered, could have been extinguished, without the mill receiving material injury, if there had been water in a certain hydrant in a street near the premises; and that the loss occurred by reason of this absence of water.

The plaintiff also put in evidence tending to show that the defendant had accepted the statute of 1864, c. 104, authorizing the introduction of water into the city; and had, under the authority of the same, introduced water and laid pipes through the streets of the city, and adopted certain ordinances in relation to the management of the same; that the plaintiff, by her agent Daniel Tainter, applied by petition to the city council to put in the hydrant above referred to, to be used for extinguishing fires, which petition was referred by a vote of the council to the committee on water, on April 12, 1869, and the committee on September 16th following, made the following report: "On petition of Daniel Tainter to be furnished water for his new mill on Garden street, the committee report that the pipe was laid in said street in 1864 by the Adriatic Mill Company, and that it is important for the purposes of Mr. Tainter and other parties wanting water upon this line that the city should own the pipe laid by this company;" that it was thereupon ordered by vote of the council that the committee on water "be authorized to purchase the pipe laid by the Adriatic Mill to Southgate street," which is the pipe to which the hydrant is attached; that in pursuance of this authority, the committee purchased the pipe for the city and verbally agreed with the plaintiff to put in the hydrant and connect the same with the acqueduct and keep the same supplied with water for the purpose of extinguishing fires, the same to remain under the control of the city for public use, provided the plaintiff would pay for the same; that the hydrant was put in by the committee and connected with the pipe, and the plaintiff paid therefor between $200 and $300; that the plaintiff also at her own expense put water-pipes into her building, and with the consent of the committee, connected them with the pipes passing through the hydrant; that the plaintiff having failed to pay water rates for the use of the water on her premises, the water was cut off on May 23, 1874, as provided in the city ordinances, from the hydrant and the pipes in her building by order of the committee on water; that the fire occured while the water of that year was so cut off; that the plaintiff had never paid her water rates due at the time the water was so cut off; that the pipes were so arranged that the water could have been conveniently cut off from the pipes in the building without cutting it off from the hydrant; and that there was an abundant supply of water in the pipe to which the hydrant was attached at the time of the cutting off and also at the time of the fire, and there was no reason for not supplying water to the hydrant, except that the plaintiff had failed to pay her water-rates, which water-rates were for water supplied for the ordinary uses of the plaintiff's mill, and not for water supplied to the hydrant.

The judge ruled that the action could not be maintained. The jury returned a verdict for defendant, and plaintiff alleged exceptions.

GRAY, C. J., delivered the opinion of the court:

This action is brought against the city of Worcester to recover damages suffered by the destruction of the plaintiff's mill by an accidental fire, by reason of the negligence of the city to maintain a hydrant by which the fire might have been extinguished. The declaration is in several counts, and no objection is made to its form, provided the plaintiff is entitled to maintain an action against the city upon the evidence stated in the bill of exceptions.

The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants, and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, reservoirs and hydrants to supply water for the extinguishment of fires. Allen v. Taunton, 19 Pick. 485; Hardy v. Waltham, 3 Met. 163; Fisher v. Boston, 104 Mass. 87, 93. The Worcester Water Act, St. 1864, c. 104, § 3, authorizes the city to make and maintain reservoirs and public hydrants "in such places as may

be deemed proper," that is to say, of course, by the city or its officers or agents, just as the St. 1867, c. 158, authorizes the Selectmen of towns, for the protection of persons and property therein against fire, to order conductors to be put into the pipes of acqueduct corporations, for the purpose of attaching hydrants or conducting water into reservoirs, and in such places as the engineers of the fire department shall think necessary. The works to be constructed by the city of Worcester, under the St. of 1864, were, so far as related to safeguards against fire, to be erected and maintained by the city for the benefit of the public and without pecuniary compensation or emolument.

The questions whether and where public hydrants should be erected were within the exclusive discretion and control of the municipal authorities, as the public interest might seem to them from time to time to require. The city by accepting the statute and building its works under it, did not enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires, upon which an action can be maintained. Grant v. Erie, 69 Penn. St. 420; Wheeler v. Cincinnati, 19 Ohio. St. 16; Brinkmeyer v. Evansville, 29 Ind. 187; Fisher v. Boston, *ubi supra*; Hill v. Boston, 122 Mass. 344.

The judgment of the Court of Exchequer in Atkinson v. Newcastle Waterworks, L. R. 6 Ex. 404, much relied on by the plaintiff, in which an action was maintained against a water company for not keeping pipes in which fire plugs were fixed, charged with water at a certain pressure, as required by its act of incorporation, whereby the plaintiff's property was destroyed, has been reversed in the Court of Appeal, consisting of Lord Chancellor Cairns, Chief Justice Cockburn, and Lord Justice Brett, 2 Ex. D. 441. In Metallic C. C. Co. v. Fitchburg Railroad, 109 Mass. 277, the action was not against the city for neglect to furnish proper means to extinguish fires, but against a third person for unlawfully cutting a hose while actually being used to put out a fire; and the decision of the Court of Exchequer in Atkinson v. Newcastle Waterworks, was cited only to the point that the act of the defendant was the direct and efficient cause of the injury.

For the reasons already stated, the plaintiff has no right of action against the city, by reason of any duty imposed or liability assumed under the St. of 1864, for neglecting to maintain the hydrant. Having failed to pay the water rates, she has no right of action for cutting off the water. And she cannot sue the city upon the alleged agreement of the committee, because the authority to purchase the plaintiff's pipe did not authorize them to agree in behalf of the city to maintain a hydrant, and there is no other evidence of any authority from the city to make such an agreement. Palmer v. Haverhill, 98 Mass. 487.

Exceptions overruled.

THE nomination of William H. Hunt, of Louisiana, to be Associate Justice of the Court of Claims, *vice* Judge Peck resigned, has been confirmed by the Senate.

CONSTITUTIONAL LAW—SPECIAL ASSESSMENT—LIABILITIES OF COUNTIES AND DISTRICTS.

BORO v. PHILLIPS COUNTY.

United States Circuit Court, Eastern District of Arkansas, February, 1878.

Before Hon. HENRY C. CALDWELL, District Judge.

1. A STATE MAY IMPOSE SPECIAL ASSESSMENTS on districts for the purpose of building levees, etc., by virtue of its police power, such an assessment not being in conflict with the constitutional provision requiring equal and uniform valuation of all property for purposes of taxation.

2. THE GENERAL RULE OF LAW that "where one takes a benefit from the result of another's labor, he is bound to pay for the same," does not apply to cases where the benefit of the work is immediately to the adjacent property, and only incidental to the county at large.

3. WHEN THE COUNTY COURT MERELY ACTS AS AN AGENT for a district, and by law it is made the duty of the county court to assess a tax on the lands of the district to pay for the work, upon a failure or refusal on the part of the county court to discharge its duty in the premises, *mandamus* is the proper remedy, but such failure or refusal will not make the county liable for the obligations of the district.

4. THE COUNTY BEING DIVIDED INTO SEVERAL LEVEE DISTRICTS, each of which is to pay its own obligations for work done within the district, the obligations, although made payable by the levee treasurer of the county, are payable only out of the funds of the district in which the work was done, and can not be made the form of an action against the county.

An act of the general assembly of this state, approved February 16th, 1859, provided, among other things: That the county courts of the counties of Desha and Phillips, should divide the overflowed lands in each of said counties into not less than four, nor more than seven levee districts; that it should appoint for each levee district, three freeholders, residents of the district for which they were appointed, whose duty it was to report to the county clerk a list of all lands in their districts, respectively, subject to overflow. For each levee district one levee inspector was, in the first instance, to be appointed by the county court, and afterwards to be elected by the qualified voters of the district, who was required to give bond to the state of Arkansas, for the use and benefit of the levee district, for which he was appointed. The levee inspector for each district assessed the lands therein for levee purposes, the act fixing the minimum value of the land for this purpose at $10 per acre, and returned his assessment roll to the county clerk, whose duty it was to enter the same on the tax book, and to extend the levee tax against the same at the rate fixed by the county court, which could not be less than one-fourth of one, nor more than two per cent. annually.

The sheriff of the county collected the taxes thus assessed and levied, and paid the same over to the "levee treasurer of the county," who, in the first instance, was appointed by the county court and

afterwards elected by the qualified voters of the levee districts, whose duty it was to receive and safely keep the levee funds of each levee district, and pay the same out on the order or warrant of the levee inspectors, drawn against the levee fund of their districts respectively.

The levee inspector for each district was invested with large powers, and authorized to make contracts for building and repairing the levees in his district, and payment for such work belonging to his district was to be made out of the fund arising from the levee tax assessed and collected for such district in the manner indicated, and the inspector was authorized, when money was due for levee work in his district, to draw his warrant upon the treasurer for the amount which the act declared "might be in the following terms, to wit:

State of Arkansas,
County of ———.

The Levee Treasurer of ——— county pay to——— or order the sum of ——— Dollars, out of any money in the treasury belonging to levee district No. ———, this ——— day of ———, 18—.

A. B. C.
Levee Inspector of Levee District No. ——."

By an act approved January 15th, 1861, the first act was amended in several respects, not material to notice, and the following provisions were enacted relating to the levee warrants or scrip theretofore issued by the levee inspectors of the several districts. Sect. 19. That all the levee bonds, scrip or drafts issued by the several levee inspectors of said counties prior to the taking effect of this act, shall be presented to the county clerk of the county in which such bonds, scrip or drafts were issued on or before the first day of January, 1862, whose duty it shall be to issue to the holders thereof the same amount of bonds, scrip or drafts, bearing the same rate of interest, which interest shall run from the date of the scrip, bond or draft bears interest before renewal, *and each bond, scrip or draft, shall be confined to the county and district in which it was issued and out of the fund of which the same is to be paid.* It was further provided that the county clerk shall keep a register of the scrip presented to him for renewal, showing the date, number, amount, to whom payable, what inspector issued the same, and the number of the district, out of the fund of which the same is payable, and shall file the same in his office for the inspection of the county court, and it was provided that levee scrip should be received in payment of levee taxes in the levee district, out of the funds of which the same is made payable, and that no lands in the county shall be taxed for levee purposes that were not taxable for that purpose under the first act, *i. e.*, lands subject to overflow, and included in a levee district. Under the provisions of section 19, of the last act, above quoted, the holders presented to the county clerk of the county levee orders or warrants, previously issued by the levee inspectors of the several levee districts in the county, and for each bond, scrip or draft so presented the clerk issued a renewal bond or draft. A further act, approved April 8th, 1869, gives to the holders of levee scrip or bonds, issued under the previous acts, one year in which to present the same to the county court for payment, filed and numbered, in order to enable the court to estimate the necessary amount to be levied each year upon the land situated in each levee district, as laid off and designated by each of said county courts, and it was made the duty of the county court to levy an annual tax upon all the lands in each of the districts to pay the levee bonds and scrip of said districts respectively. The levee bonds or scrip in suit were presented to the county court and filed and registered as required by this act.

The county court refused or neglected to levy a tax on the lands in the levee districts to pay scrip or bonds, as required by the act of 1869, and no such tax has been assessed or collected since 1862, and no moneys arising from such a tax are now or ever have been in the county treasury or used or appropriated by the county for general county purposes, but all moneys arising from the levee tax on lands, is these districts, were paid out by the levee treasurer on levee bonds, or scrip issued for building and repairing levees in the several districts.

The acts of February 16, 1859, and January 15th, 1861, were repealed by the act of March 23d, 1871. The plaintiffs are holders of a large amount of the renewal bonds issued by the county clerk, under sec. 19, of the act of January 15th, 1861, and seek by this action to recover a general judgment against the county thereon.

W. H. Hiddell, for plaintiff; *Tappan & Hornor* and *Palmer & Nicholls*, for defendant.

CALDWELL, J.

In seasons of high water, a considerable portion of the finest cotton lands of the south, bordering on the Mississippi and its tributaries, are subject to overflow. The protection of these lands from inundation by the construction of levees was early found to be practicable and necessary to the growth and prosperity of the rich alluvial districts of the southern states. Coeval with organized governments in these states, laws were passed looking to the reclaimation of these lands by the construction of levees, and providing a mode in which the money should be raised to pay the same. The usual mode adopted for this purpose was to divide the overflowed lands into convenient districts, appoint local officers therefor, to determine the location of levees and to contract on behalf of the district for their construction and repair, and providing for a special assessment on the lands benefitted by the construction of the levees to pay the cost of the same.

The authority of the state to impose a special assessment for this purpose on the lands benefitted is vested in the police power. A special assessment for such a purpose is not a tax in the strict legal sense of that word, and hence it has been uniformly held that the usual constitutional provisions requiring the burdens of taxation to be equally distributed, and requiring an equal and uniform valuation of all property for purposes of taxation, have relation to taxation for general state and county purposes, and are not limitations on the exercise of the police power, and do not inhibit

special local assessments, when the fund raised is expended for the improvement of the property taxed. McGhee v. Mathis, 21 Ark. 40. Cooley on Taxation, pp. 401, 402, 427, and authorities cited.

The policy of imposing the cost of the construction and repairs of the levees on the lands benefitted thereby, was adopted by the legislature in reference to the levees in Desha and Phillips counties. The acts are explicit on that subject. By these terms these lands subject to overflow are divided into districts. Each district has its own officers to contract on behalf of the district for the construction of levees.

Provision is made for raising a fund to pay for all levee work by an assessment on the lands benefitted, and it is expressly provided that other lands and property in the county shall not be assessed or taxed for this purpose.

The acts in question adopted a scheme for the construction of levees and raising a fund to pay therefor quite independent of the action of the county proper in its corporate capacity. The contracts for levee work were to be made by the levee inspector of the district, and the work was to be paid for out of the levee fund arising from the assessment made on the lands in the levee district. The warrant or order for such payment was drawn by the levee inspector of the district on the levee treasurer of the county, an officer elected by the qualified voters of the levee districts of the county, and not by the qualified voters of the whole county, and was payable out of money in his hands, belonging to the levee district in which the work was done. The levees that might be built were for the exclusive benefit and advantage of the land reclaimed from overflow, and for this reason the acts in question made provision for the whole cost of the construction upon the lands thus benefitted. If this scheme proved inadequate for raising the funds, that does not make the county liable. The act does not provide that the county shall be liable in such an event, or in any event, and the general rule "that when one takes a benefit from the result of another's labor, he is bound to pay for the same," does not apply to cases of this kind, where the benefit arising from the work or improvement is immediately to the adjacent property and only incidently to the county at large. Argente v. San Francisco, 16 Cal. 255. Opinion by Field, C. J.

The acts impose no liability on the county. Neither the county court nor any officer of the county had any authority or power to enter into a contract, or make or create an obligation binding on the county in relation to the work. It was suggested in the argument that a sufficient authority for the county court to bind the county in such case was found in Section 9, Article 6, of the constitution of 1836, in force at the date of the transaction, which declares "the county court shall have jurisdiction in every other case necessary to the internal improvements and local concerns of the county."

In 1857 an act was passed providing for the construction of levees in Chicot county, identical in many of its provisions with the acts here in question, and in McGhee v. Mathis, *supra*, the Supreme Court say: "Nor are the levees provided for by act of January 7th, 1857, an 'internal improvement and local concern,' within the meaning of that clause of the constitution above cited. These terms, as there employed, relate to public internal improvements, and local concerns for general county purposes, which appertain to the county at large as a body politic, and not to improvements for special local purposes, where the funds expended in making the improvements are raised by assessments imposed only on the particular property improved." But in this case the county court has not attempted to make the cost of these levees a charge upon the county, and, if it had done so, its act would have been a nullity. By the terms of these acts, there were but two parties to the contracts to build the contemplated levees—the levee inspector of the district acting for and in behalf of his district and the contractor.

The act pointed out specifically the source from whence the fund was to be obtained to pay for such work, and limited the payment to that fund, and the parties must be presumed to have contrac ed in reference to these provisions of the act. The county was no party to the contract, and no contract or obligation entered into by a district levee inspector could bind the county. What the county court had to do in the premises was to levy such rate of tax within the limits fixed by the act, on the lands in each district as listed, assessed and reported by the levee inspector thereof, as might appear to be necessary to meet the obligations of the district. The county court was merely resorted to as a convenient and suitable agent for these purposes. If the county court failed or refused to discharge its duty, it might have been compelled by mandamus, or other appropriate proceedings at the suit of an aggrieved party to perform its duty, but the failure of the county court to discharge any or all of the duties imposed on it by these acts would not render the county liable for the debts of the levee districts. If the money arising from the local assessments to pay the debts of the levee districts have gone into the county treasury and been used or appropriated by her for general county purposes, a different question would be presented, but the fact is conceded to be otherwise. The bonds or certificates sued on were issued by the county clerk, and were intended, doubtless, to conform to the requirements of section 19, of the act of January 15, 1861, if not issued by authority of that section, they are of no validity, because no other authority for their issue can be found.

There is an obvious error in the preamble to these renewal bonds, the clerk reciting that they are issued under and by virtue of section 11, of the act of February 16, 1859, when it is apparent that they must have been issued under section 19, of the act of January 15, 1861. That section expressly provides, that each renewal draft issued by the clerk "should be confined to the county and *district* in which it was issued and out of the fund, of which the same is (to be) paid." They were intended to

be, and declared to be, "renewals" of the drafts drawn by the levee inspectors of the several levee pistricts, and like them they were made payable in terms out of money in the treasury belonging to the levee district, in which the work was done. The bonds in suit declare the "levee treasurer" will pay the sum named therein "in part payment of work done according to contract within and for Levee District, No. ——." They are not in terms payable out of the funds of any particular district, though the district in which the work was done, on account of which the bond is issued, is mentioned, and inasmuch as the act provides, the work done in a district shall be paid for out of the funds of that district, it is possible the legal effect of these bonds is the same, as if they had been made payable in terms out of the funds of the district liable for their payment. If this is not so, then the bonds on their face are void for non-compliance with the law, and the levee treasurer, though in possession of funds to do so, would not be authorized to pay them. Martin v. City and County of San Francisco, 16 Cal. 285; Bayerque v. City of San Francisco, 1 McCol. C. C. Rep. 175. And if they are treated as valid instruments properly issued under the law, then they are payable only out of the funds of the levee district in which the work was done, and can not be made the foundation of an action against the county. Dillon on Mun. Cor., section 413; Lake v. Trustees of Williamsburg, 4 Denio, 520; McCollough v. Mayor of Brooklyn, 23 Wend. 458; Keagsberry v. Pettis County, 17 Mo. 479; Campbell v. Polk County, 49 Mo. 214.

This act of 1869 removed or postponed the bar of the statute of limitations, changed the mode of assessing the lands in the levee districts for levee purposes, and re-enacted with some emphasis the provisions of the act of 1859, relating to the duty of the county court to levy the required tax on the lands in the several levee districts to pay the debts of those districts respectively.

This act is not repugnant to the Constitution in any of its provisions, but it does not impose the levee districts on the county.

Judgment for defendant.

WILLFUL ACTS OF SERVANTS.

A communication in a recent number of this Journal, *ante* p. 251, contained so severe an attack upon the principle of law governing the responsibility of the master for the tortious acts of his servant, as laid down by Lord Kenyon in the leading case of McManus v. Crickett. 1 East, 107, that it ought not to pass unnoticed. After being cited as law for three-quarters of a century, McManus v. Crickett has never been repudiated by any court, nor, so far as appears, even doubted. And the dictum of Lord Kenyon is especially worthy of remembrance as combining, in language exact and luminous, the earliest statement of the doctrine, since fully developed, that the motive of the servant is material in making out the master's liability, this being one of the few cases where motive is of any consequence in an action of tort.

Certainly there has been great confusion in this branch of the law, and not a little of it, as was intimated in the article referred to, is owing to the loose use of the word "willful." Even Baron Parke said that the master was not liable for the servant's willful acts; but the decisions having now settled down to the view that willful means simply "on purpose," such cannot now be said to be the law. The chief perplexity on this subject springs from the difficulty of framing a general rule to guide the court in determining what is properly a jury question. The following, drawn inductively from a large number of cases has served the writer in the understanding of others.

The master is responsible for the injurious consequences of his servant's act, which is one of a class of acts so far within the scope of his employment as to be directly adapted to the attainment of the end or object for which the servant is hired, unless the servant "had quit sight of the object for which he was employed," (McManus v. Crickett) and does the act accidentally or solely for the attainment of a personal end. If he has thus quit sight of the object for which he was employed, then, whether the act is or is not adapted to advance this object, the master is not responsible. If the servant does the act from motives both personal and official the master is responsible.

That the master is liable when the servant acts from mixed motives, see Howe v. Newmarch, 12 Allen 49; Puryear v. Thompson, 5 Hump. 397.

The ground of the master's liability having its origin, as it does, in the old law of status, is not very satisfactorily explained; but so far as any principle underlies the modern cases, it seems to be this, that when the master sets before the servant an end to be attained, he necessarily trusts to his discretion as to the means or method of attaining it, and gives an implied authority thus to use a discretion. Nor can he exempt himself by specific instructions or prohibitions as to particular means, for this is only in effect saying that he does not trust to the servants discretion, which is contrary to the fact. The real question, then, is as to how far, taking into view the purpose for which the servant is hired and the circumstances under which he may have occasion to act, the master does, in fact, trust to his discretion, or, in other words, how far an authority can be implied to resort to particular means to effect a general end, for which some choice of means is of necessity left to the servant's judgment. It is evident there must be more than a remote connection between the means and the end. If I send my servant to shoot a certain bird, and to be more sure of hitting it, he practices at a mark and chances to injure my neighbor, I am not liable. The act which caused the mischief had some tendency to further the object sought, but quite too remote. This whole matter being a question of degree, it is not surprising that the courts have eagerly grasped at generalizations as a guide to the settlement of particular cases. For example, in the class of cases where it is sought to charge the owner of a team with injuries resulting from the negligence of the

driver, it is laid down by some English judges that the master is liable if the servant has only made a slight detour from the road, but not if he has branched off on an independent journey of his own. But it is submitted that Whatman v. Pearson, L. R. 3 C. P. 422 is the better law; for there the court seem to have proceeded on the ground that to guide the horses in a particular direction was only one of a coachman's bundle of duties, and as long as he endeavors to manage the horses in general obedience to the master's orders and for the master's sake, the latter was responsible for faults of management, even though the coachman had deviated widely from the proper line of his journey. Perhaps the test of the master's liability would be whether he would fail in an action against the servant for conversion, on the ground that the constructive possession was in himself.

But a more remarkable instance of an attempt at a general rule by which to determine whether authority may be implied, is the case of Poulton v. The Railroad L. R., 2 Q. B. 534, followed in Bolingbroke v. The Local Board of Swindon, L. R. 9 C. P. 575. In the first case a railroad company was sued for wrongfully arresting the plaintiff, who had paid his own fare but not that of his horse. The statute only gave power to detain a person on non-payment of his own fare. The station master misapplied the statute and detained the passenger for non-payment of the horse's fare, and the court held the company not liable inasmuch as in every view of the facts assumed to be true by the agent, the company themselves would have had no power to make the arrest, and therefore could not be held to have given any implied authority to their agent. One hardly dares to state abstractly the doctrine of this case; but judging from the remarks and the opinion of Blackburn, J., it amounts to this: that though a master cannot limit his responsibility by particular directions as to means and method, yet, when the means is one that on the facts assumed as true by the servant, is necessarily and always *ultra vires*, or illegal; in other words, when the servant makes a mistake of law, instead of fact, no authority from the master can be held to be implied. But if this be the theory upon which the court proceeded, the effect will be to overrule a great number of cases whose authority has never been doubted. In the cases of "polting" an omnibus by a driver on a rival line, of which there have been several in the English courts (Limpas v. Gen. Omnibus Co., 1 H. & C. 526; Green v, McNamara, 1 L. T. N. S. 9.) the company, if present, would have had no right thus to blockade the rival omnibus, and yet they are liable, beyond question, if their agents do so. In the numerous cases where common carriers have been held responsible when their servants have ejected an offending passenger with unnecessary violence, it is the excess of force which is the ground of the action, and it might be said, as was remarked in Poulton v. The Railroad, that "an authority cannot be implied to have been given to a servant to do an act, which, if his master were on the spot, the master would not be justified in doing, on the assumption of a particular state of facts." The companies, if present, *in propria persona*, if guilty of excess, would have done an illegal act and one beyond their powers, but there has never been a doubt of their liability.

The error of the court, if error there be (and one needs to be cautious in criticising a decision of Lord Blackburn) would seem to have been in considering simply whether the arrest, under the actual circumstances, might by implication, be included among the objects for which the station-master was hired (see the above rule) rather than looking at it as a means, illegitimate but not unnatural, chosen by the servant in the exercise of his discretion, to carry out what was without doubt one of the purposes of the hiring, i.e., the collection of fares. Of course nothing that was *ultra vires* of the corporation could be said to be implied among the objects of the hiring, without some foundation for it in the express commands; but when we come to apply the rule laid down by the Queen's Bench as a test whether an authority for the *means* used by the servant in the prosecution of the master's purposes, may be implied so as to charge the latter, we are met by the fact, as pointed out somewhere by Chief Baron Kelly, that if a mere trespass or conversion is *ultra vires*, a corporation could never be made liable in tort.

A directly contrary decision has been made in Massachusetts in the parallel case of Ramsden v. B. & A. R. R., 104 Mass. 117, in which the corporation were held liable for an assault of a conductor, which consisted of seizing the parasol of a passenger to enforce payment of fare, when he had by law only power to eject the passenger or to detain baggage. The case in the Queen's Bench is also in conflict with a class of cases, found mostly in the law of carriers, the principle of which was first hinted at by Judge Story and was laid down in Goddard v. Grand Trunk R. R. 57 Me. 213, as follows: "The carrier's obligation is to carry his passenger safely and properly and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which he executes the trust." To the same effect are Bryant v. Rich, 106 Mass.; Railroad v. Finney, 10 Wis. 388. This dictum has not been recognized in England and has scarcely found its way into the text-books; but seems destined in this country to a full development. Stated generally, it is that when the act of the servant is a breach of the master's contract, the master is liable. So far as appears it has never as yet been applied to any cases but those of common carriers, where usually a breach of contract is equally a tort.

Cambridge, Mass. C. H. B.

AN English magazine has discovered that the practice of giving detailed descriptions of the personal appearance and social habits of criminals, which are now acknowledged features of newspaper reporting, has a tendency to invest the prisoner with something of a meretricious glory, which ought to be condemned by all properly-minded people.

NOTES OF RECENT DECISIONS.

LIABILITY OF MUNICIPAL CORPORATION FOR INJURY BY SURFACE WATER FROM STREETS.—*Wakefield v. Newell.* Supreme Court of Rhode Island, 17 Alb. L. J. 362. Opinion by DURFEE, J.—1. No action lies against a municipal corporation for allowing the ordinary and natural flow of surface water to escape from a highway on to adjacent land. Nor will an action lie for the results of such usual changes of grade as must be presumed to have been contemplated and paid for at the lay out of the highway. 2. A municipal corporation has the same power over its highways in respect to surface water as an individual has over his land. Inman v. Tripp, 11 R. I. 520, explained and affirmed.

FIRE INSURANCE — ESTOPPEL.—*Bennett v. Maryland Fire Ins. Co.* United States Circuit Court, Northern District of New York. 17 Alb. L. J. 366. Opinion by WALLACE, J.—1. Plaintiff, through an insurance broker, procured from the agent of a fire insurance company a policy insuring his building in such company. Plaintiff paid the broker the amount of premium, but the agent gave the broker credit for such premium. The company informed the agent that it would not accept the risk on plaintiff's building, but the agent said nothing to plaintiff. Thereafter plaintiff, desiring to make some alterations in the building, which would increase the risk, applied to the agent to indorse on the policies permission to do so. The agent said it would be necessary to apply to the company and he took plaintiff's policy to send to the company for such permission. The agent sent the policy, informing the company of the facts. The company kept the policy to cancel it, but gave plaintiff no notice to that effect. Subsequently the building was burned. In an action on the policy: *Held*, that the company was estopped from claiming that the policy was not in force. The policy required that in case of loss, plaintiff should give notice forthwith in writing to the company. The plaintiff told the agent of the loss, who wrote to the company, which claimed not to be liable on the ground that the policy never had been in force. *Held*, that the company could not thereafter set up informality in giving notice, etc., of the loss. 2. A defense that plaintiff had, in violation of the terms of the policy, increased the risk, *held*, not available unless set up in the answer.

VALIDITY OF JUDGMENT OF FEDERAL COURT—"ESTATE OR INTEREST IN LAND"—MORTGAGE.—*Terrell v. Warren.* Supreme Court of Minnesota. Ch. L. N. 262. Opinion by CORNELL, J.—1. A judgment rendered by the Circuit Court of the United States for the District of Minnesota, occupies the same footing as a domestic judgment of a superior court of record of this state. Its validity can not be impeached in a collateral proceeding by parol proof, showing that no jurisdiction was ever in fact acquired over the person of the defendant therein. Jurisdiction is conclusively presumed unless the contrary affirmatively appears upon the face of the record. 2. A mortgage lien upon real property is not an "estate or interest in land," within the meaning of Sec. 1, Chap. 75 Gen. Stats. Bidwell v. Webb, 10 Minn. 59, and Brackett v. Gilmore, 15 Minn. 245, followed.

DIGEST OF DECISIONS OF SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

KNOWLEDGE OF INSOLVENCY UNDER BANKRUPT ACT.—The provision in the Bankrupt Law making a payment or security received from the bankrupt by a creditor "having reasonable cause to believe such a person is insolvent" void, does not make them void for a mere suspicion of the debtor's insolvency, but requires for that purpose that the creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact calculated to produce such a belief in the mind of an ordinary intelligent man.—*Grant v. First National Bank of Monmouth.* Appeal from the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice BRADLEY. Reported in full, 17 Alb. L. J. 367.

EQUITABLE MORTGAGE—POWER—NOTICE OF SALE—TRUSTEE.—1. A conveyance of land to secure the payment of a sum of money with power of sale, whether made to the creditor or a third person, is in equity a mortgage, if there is left a right to redeem on payment of the debt thereby secured. 2. A sale under the power in such an instrument must be made in strict conformity to the directions therein prescribed, or to such as may be prescribed by statute, or the sale will be absolutely void. 3. A sale made on six weeks' notice, though followed by conveyance, when the mortgage and the statute of the state require twelve weeks, is void, and does not divest the equity of the party who had the right of redemption. 4. A person holding the strict legal title, with no other right than a lien for a given sum, who sells the land to innocent purchasers, must account to the holder of the equity for all he receives beyond his lien.—*Shillaber v. Robinson.* Appeal from the Circuit Court of the United States, for the Eastern District of New York. Opinion by Mr. Justice MILLER. Decree reversed.

SAVINGS BANKS — DIVIDENDS TO DEPOSITORS—CAPITAL—SURETY BOND.—1. A corporation created to receive deposits for the use and benefit of the depositors, to be invested and the income or interest thereon to be divided among the depositors or their legal representatives, and to which the corporators contribute nothing, has no shareholders, and the profits must be paid to the depositors. 2. A bond to secure the depositors can not be considered as capital of the corporation. "We think the complainants have mistaken the nature of the corporation. It is not a commercial partnership nor is it an artificial being, the members of which have property interests in it. Nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depositary for the money of those members of the community disposed to entrust their property to its keeping. It is somewhat of the nature of such corporations as church wardens for the conservation of the parish, the college of surgeons for the promotion of medical science or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage without any interest in its members. The title of the act incorporating it indicates its purpose, namely, an act to incorporate a national savings bank, and the only powers given to it are those we have mentioned, powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives. It is like many other savings institutions incorporated in England and in this country during the last sixty years, intended only for provident investment, in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are *quasi* benevolent and most useful because they hold out no encouragement to speculative dealing or commercial trading. This was the original idea of savings banks. Scratchley's Treatise on Savings Banks, *passim;* Grant's Law of Bankers, 571, where, in defin-

ing savings banks, it is said the bank derives no benefit from any deposits or the produce thereof. Such are savings banks in England, under the statutes of Geo. 4, c, 92, § 2, and 26 & 27 Victoria, c. 87. Very many such exist in this country. Among the earliest are some in Massachusetts, organized under a general law passed in 1834, which contained a provision like the one in the act of congress, that the income or profit of all deposits shall be divided among the depositors, with just deduction of reasonable expenses. They exist also in New York, Pennsylvania, Maine, Connecticut, and other states. Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, enure wholly to the benefit of the depositors in dividends or in a reserved surplus for their greater security. Such, very plainly, is the defendant corporation in the case."—*Huntington v. National Savings Bank.* Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Justice STRONG. Decree affirmed.

ABSTRACT OF DECISIONS OF THE ST. LOUIS COURT OF APPEALS.

[Filed May 7, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

MECHANIC'S LIEN—PARTIES — PRACTICE.—Where the sub-contractor sues the owner for the purpose of enforcing a mechanic's lien against the property, if he does not make the original contractors parties defendant when he begins the suit, he can not bring them in after the expiration of the ninety days prescribed by law for suing on the lien. The person availing himself of the mechanic's lien law, must bring himself within its special provisions; the ninety days are not a period of repose to bar actions, but are a limit to the existence of the lien. Affirmed. Opinion by HAYDEN, J. —*Fury v. Boeckler.*

CORPORATION — EVIDENCE OF INCORPORATION — TRUST DEED — PUBLICATION OF NOTICE—1. In an action by a corporation growing out of a deed to which the corporation and the defendants were parties, the deed reciting the incorporation of plaintiff being in evidence, no testimony of the actual incorporation of plaintiff is necessary. 2. Where the terms of a deed of trust require thirty days advertisement of foreclosure, and it appeared that the first publication was on the 22d of September, and the last on 22d of October, that the sale was on 23d of October, and that publication was omitted on three days between those dates, and these omissions are such as might have occurred owing to the absence of publication on Sunday, the notice will be treated as continuous; and, as more than thirty days elapsed between the first publication and the sale, the notice is good. The appellate court will not curiously inquire to see whether the omitted days were actually Sundays, in order to avoid the foreclosure and reverse the judgment. Affirmed. Opinion by HAYDEN, J.—*German Bank v. Stumpf.*

MARRIED WOMAN — CONTRACTS OF, AT LAW AND IN EQUITY.—1. Where a married woman, together with her husband, executes a promissory note and afterwards becomes discovert, a court of equity has no jurisdiction, after the determination of her coverture, of a proceeding to subject her separate estate to the payment of the debt. The remedy is at law. The contract of a married woman, though it can not be enforced at law during her coverture, is not a mere nullity; equity lends its process to enforce it during coverture, because it can not otherwise be enforced; but the occasion ceasing, the extraordinary remedy can not be had. 2. The contract of a married woman creates no lien upon her separate estate; but equity considers the married woman, by reason of her separate property, as a *feme sole*, and resorts to that property to discharge her obligations, whether written or not. Reversed and remanded. Opinion by HAYDEN, J.—*Hooten v. Ransom.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF IOWA.

April Term (*Dubuque*), 1878.

HON. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS,
" JAMES G. DAY,
" JOSEPH M. BECK, } Associate Justices.
" AUSTIN ADAMS,

UNDER SEC. 536 OF THE IOWA CODE, providing that a city marshal "shall have in the discharge of his duties like powers, be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases," a *county* is not liable for his services. Reversed. Opinion by ADAMS, J.—*Christ v. Polk County.*

EXEMPTION—PHOTOGRAPH GALLERY.—A building used as a photograph gallery, although personal property and movable: *Held*, not exempt from execution under the statute exempting "tools of a mechanic," in the absence of evidence that any other building would not as well answer the purpose for which it was used. Opinion by SEEVERS, J.—*Holden v. Stranahan.*

CRIMINAL LAW—"COMPOUND OFFENSE" IN IOWA CODE.—Burglary and larceny when committed in connection are not a "compound offense," within section 4300 of the Iowa code, which provides that "the indictment must charge but one offense, provided that in case of compound offenses where in the same transaction more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein." 29 Cal. 625; 24 Conn., 65. On rehearing. Judgment reversed. Opinion by ADAMS, J.—*State v. Ridley, et al.*

INFANCY — NEXT FRIEND—LIABILITY FOR COSTS. —1. At common law, the next friend of an infant plaintiff is liable for the costs of the suit. Schouler's Dom. Rel. 594; 1 Am. Lead. Cas., 325, 329; Bacon's Abridgment, Vol. 5, 153. 2. The Iowa code of 1851 and 1860 provided that the next friend should be responsible for costs. In the revision of 1860 and the present code this provision is omitted. *Held*, that as that provision was merely declaratory of the common law, it may well be said that it was omitted because the next friend is liable without any statutory enactment. Affirmed. Opinion by ROTHROCK, C. J.—*Vance v. Fall.*

PAYMENT—DEBT TO PARTNERSHIP—PAYMENT OF PARTNER'S INDIVIDUAL DEBT.—Defendant bought cattle of the plaintiff, having reason to suppose that they were owned by plaintiff and another, as partners, while they were in fact the property of plaintiff. At the request of the other partner, defendant paid a note signed by both partners, but which, as he would have learned by reasonable inquiry, was signed by plaintiff as surety. In an action to recover the price of the cattle: *Held*, that while payment to the supposed partner would have discharged the debt, payment of his individual debt would do so only to the extent of his interest in the cattle, and, he having no interest, plaintiff was entitled to recover their full value. Opinion by ROTHROCK, C. J.—*Essix v. Hays.*

CONFESSIONS — INSTRUCTIONS.—1. The following instruction was refused by the court: "Confessions, alleged to have been made by the prisoner in the presence of the prosecutor alone, or in the presence of the prosecutor and one or more of his select friends, are the weakest of all testimony deemed competent in law, and should be received and considered as such; and confessions made in the presence of any one witness, alone, are deemed in law as weak and unsatisfactory, unless corroborated by other testimony." *Held*, no error. While a confession should be examined with care, if made voluntarily, it should not be rejected as weak or unsatisfactory because made in the presence of the prosecutor and his friends. 2. The condition of the defendant's mind at the time he made the confession should be considered only for the purpose of determining whether he had at the time sufficient mental power and capacity to know what he was saying. Opinion by ROTHROCK, C. J.—*State v. Brown.*

ATTORNEY AND CLIENT.—1. Action for legal services; one item being a charge of $500 for services in a divorce suit. Plaintiff testified that while the case was pending he desired, on account of complications in the case that were compromising him in his profession, and told the defendant that he would withdraw unless he had a contract for more than an ordinary fee. *Held*, error not to allow the defendant in cross-examination to ask the plaintiff what these complications were. Where an attorney sets up an express agreement to pay such a fee exacted of a client when the work was two-thirds done, under a threat of withdrawing, nothing but the best reasons will be sufficient to uphold the agreement. 2. By "more than an ordinary fee" is meant more than the reasonable value of the services estimated according to the custom of charging for like services in the court in which the services were rendered. Reversed. Opinion by ADAMS, J.—*Bilton v. Daily.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

ARBITRATION AND AWARD.—Where parties agree to leave a controversy to be arbitrated by others, and an award is made, to which both assent, and one of them performs his part thereof, being the surrender of a promissory note of the other, the other, having assented and accepted the performance, must comply with his own part of the award. The statute has nothing to do with the case. Opinion by NAPTON, J.—*Phelphs v. Couch.*

CRIMINAL PRACTICE.—Where on appeal in a criminal case a diminution of record had been suggested, supported by affidavit, as to defects and incorrect statements in the record, and a *certiorari* had been awarded, upon the return of which it appeared that the records of the court below, in relation to the case, had been destroyed, so that no correct record could be made, on motion of the defendant the judgment is reversed and the cause remanded. The defendant is entitled to have his case reviewed in this court. Opinion by NAPTON, J.—*State v. Reed.*

MURDER—INSTRUCTIONS.—An instruction that "the distinction between murder in the first degree and murder in the second degree lies in the intention with which the act of killing was done. Where a homicide has been committed, and there was an intention to commit the act, there, in the absence of any circumstances of excuse, justification or palliation required by law as sufficient, it is murder in the first degree," is erroneous, and the judgment must be reversed, even though another and proper instruction was given on the same point. State v. Mitchell, 64 Mo. 191. Opinion by NAPTON, J.—*State v. Deering.*

TROVER AND CONVERSION.—The plaintiff averred that defendant took and converted to his own use a cow belonging to plaintiff. Proof tending to show that plaintiff had the cow with other cattle in a stock-pen on the railroad, and that after the cattle were shipped the cow was never seen any more in that vicinity. Instruction that "plaintiff must establish, by preponderance of testimony, that plaintiff took and shipped the cow, and converted her to his own use." *Held*, that the instruction was erroneous. The trespass was of itself a conversion sufficient to maintain the action. 9 Mo. 230; 5 Minn. 490; 15 M. & W. 448, Hillard on Torts, 96. Proof that the defendant had the cow in his stock-pens makes a case *prima facie*. Opinion by NAPTON, J.—*Ireland v. Horseman.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK, }
" JAMES L. WORDEN, }
" GEORGE V. HOWK, } Associate Justices.
" SAMUEL E. PERKINS, }

RAILROADS—NEGLIGENCE.—In this case, the plaintiff's mare was frightened by the locomotive of the defendant, so that she ran into a bridge, became entangled among the ties, and was so injured that she died. *Held*, that railroad companies are not liable for frightening animals by their locomotives, even though the fright caused the animals to kill themselves. Opinoin by BIDDLE, C. J.—*The B., P. & C. R. R. Co. v. Thomas.*

PROMISSORY NOTE — ELECTION BY PLAINTIFF—ESTOPPEL.—Where it is doubtful whether a promissory note is the note of a corporation or of the individuals who signed it, the plaintiff puts a practical construction on the note by treating it as the obligation of the corporation. Bishop on Cont., 598; 9 Wall. 50. Whether the plaintiff, having sued upon it as the obligation of the corporation, would be absolutely estopped to claim that it was the note of the individuals who executed it as directors, not decided. Opinion by WORDEN, J.—*Armen, et al. v. Hardin.*

PROMISSORY NOTE—INDORSEMENT — PLEADING—LAW OF SISTER STATE.—1. When indorsements on a note are without date or designation of the place where made, the presumption is that they were made at the time and place of the execution of the note. 2. The common law will be presumed to prevail in a sister state, the contrary not being shown. 3. The law merchant is a part of the common law and governs bills of exchange, but it did not, by the common law, apply to promissory notes. 4. To enable the courts of one state to judicially know and administer the statute law of a sister state, that law must be pleaded and proved as a fact. Opinion by PERKINS, J.—*Patterson, et al. v. Carrell, et al.*

STATUTE OF FRAUDS — PROMISE TO PAY THE DEBT OF ANOTHER.—A contract to answer for the debt of another must not only be in writing, but must rest upon a sufficient consideration. Where the plaintiff filed his claim against the estate of a deceased person and obtained judgment thereon, and afterwards

the mother of such decedent, in consideration of the receipt by her of all the personal property of the deceased, promised to pay plaintiff the amount of his judgment, which she afterwards refused to do: *Held*, that even if the consideration was sufficient, the promise not being in writing was within the statute of frauds. The new agreement must extinguish the original debt; otherwise it will be regarded as collateral and within the statute. The agreement in this case did not put an end to plaintiff's claim against the decedent's estate, which he was still free to pursue. Opinion by WORDEN, J.—*Langford v. Freeman.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.

[Filed May 7, 1878.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. McILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

IN AN ACTION FOR LIBEL, the jury may, in estimating *compensatory* damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action, although there may be circumstances of mitigation not amounting to a justification. Opinion by GILMORE, J.—*Finney v. Smith.*

PRACTICE — ACTION FOR SALE OF MORTGAGED PREMISES—SUMMONS—JUDGMENT.—1. In an action for the sale of mortgaged premises and for a personal judgment, pursuant to the act of 1864 (S. & S. 575), no indorsement on the summons as to the amount or nature of the claim is necessary, the case being governed in that respect by section 57 of the civil code; but where an indorsement was made which truly indicated the amount for which judgment was afterwards taken, and contained the further statement that the plaintiff sought "equity relief," a personal judgment and order of sale, rendered on default, will not be reversed. 2. Where in such action judgment was rendered on the note secured by such mortgage, against the maker and payee as indorser who had assigned the note and mortgage to the plaintiff, and an order of sale was made, the fact that the payee had not been served with process constitutes no ground for a reversal of the judgment or order as to such maker. Opinion by OKEY, J.—*Larimer v. Clemmer.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1878.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE,
" WM. P. LYON,
" DAVID TAYLOR,
" HARLOW S. ORTON,
} Associate Justices.

COLLATERAL SECURITIES—NEGLIGENCE OF HOLDER IN COLLECTING WHEN DUE.—1. A creditor who holds notes or other obligations for the payment of money, assigned to him by his debtor as collateral security, and neglects to use reasonable diligence to collect them when due, must bear the loss thence accruing. 2. In an action by such creditor against the debtor the burden is upon the latter to show that loss upon the collaterals was caused by the creditor's negligence. 3. A bond and mortgage given to secure a loan were conditioned that the borrower should keep the mortgaged premises insured for the benefit of the lender, as collateral security, and the policy of insurance, with a clause that any loss should be payable to the lender, etc., was delivered to him. *Held*, that after a loss, the lender, on presentation of the policy, with the bond showing his continued interest, would have been entitled to receive from the insurer the amount of the loss. Opinion by LYON, J.—*Charter Oak Life Ins. Co v. Smith, et al.*

VARIANCE—WARRANTY, EXPRESS AND IMPLIED.—1. In an action upon a promissory note, the answer merely set up as a defense a failure of consideration by a failure of the machine for which the note was given, to work as specially warranted, with a claim for damages for such breach of warranty by way of recoupment; but the question litigated, without objection on either side, was whether the contract had not been rescinded by a failure of the machine, and an offer to return it by defendant. *Held*, That the variance must be disregarded here. 2. The express warranty shown was that the machine was well made, of good materials, and if properly operated would do as good work, in grain or gra s, as any other machine of its class in the market. The court charged the jury that the taking of express warranties upon other points does not exclude the warranty implied by law, that the article is reasonably fit for the use for which it is manufactured or purchased; and that, if the machine was so defective as to be practically useless for the purpose of reaping grain, their verdict should be for defendant, unless he had waived the benefit which the law gives a purchaser under an implied warranty. *Held*, that as an express warranty is broader than that implied by law, the instruction, if incorrect, could not prejudice the plaintiffs. Opinion by COLE, J.—*Russell & Co. v. Loomis.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

November Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" OTIS P. LORD,
" AUGUSTUS L. SOULE,
} Associate Justices.

ASSUMPSIT FOR USE AND OCCUPATION.—In order to maintain assumpsit for the use and occupation of land, something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. Codman v. Jenkins, 14 Mass. 93; Boston v. Binney, 11 Pick. 1; Bancroft v. Wardwell, 13 Johns. 489; Smith v. Stewart, 6 Johns. 46; Wood v. Wilcox, 1 Denio, 38. If the defendant was a mere licensee, or a trespasser, the action will not lie. Opinion by AMES, J.—*Central Mills Co. v. Hart.*

WITNESSED NOTE—STATUTE OF LIMITATIONS. An action on a witnessed promissory note, which by the statute of limitations is barred after twenty years from the date thereof, may be maintained at any time within twenty years after the date of a part payment thereon; for the statute which begins to run anew from the time of the part payment, is the statute which governed the limitation of actions on the obligation or debt at its inception. Estes v. Blake, 30 Me. 164; Lincoln Academy v. Lowell, 38 Me. 179; Howe v. Saunders. 38 Me. 320. See Von Hemert v. Porter, 11 Met. 210. Opinion by SOULE, J.—*Gilbert v. Collins.*

MORTGAGE—STATUTE OF FRAUDS—EVIDENCE.—1 In an action of contract it appeared that the plaintiff held the overdue notes of E secured by a mortgage of

personal property. The condition of the mortgage contained a clause forbidding a sale of the property by the mortgagor without the consent of the mortgagee. The defendants requested the plaintiff to consent to a sale from E to S, subject to the mortgage; the latter agreeing to pay the mortgage to the plaintiff, and the defendants agreeing, on their part, to pay the plaintiff such portion of the mortgage and notes as S should fail to pay. *Held*, that this agreement of the defendants was a promise to pay the debt of another, and as such was within the statute of frauds. 2. The previous talk of the parties as to what they proposed to agree to in a writing to be drawn up, is not admissible as evidence of the contents of such instrument if lost. Opinion by COLT, J.—*Richardson v. Robbins.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

April Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" T. M. COOLEY, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

BILL TO QUIET TITLE—PENDING ACTION AT LAW — DATE OF ACKNOWLEDGMENT AS SHOWING TIME OF DELIVERY — CONVEYANCE OF REMAINING INTEREST—PRIOR UNRECORDED DEED.—1. Bill to quiet title to lands, a small part of which complainant had contracted to R & O, who were in possession. Complainant claimed actual possession of the rest. When the bill was filed, ejectment was pending at law by these defendants against R and O. *Held*, that equity has jurisdiction, although the questions involved are such as may be passed upon in the action at law. It is not matter of course to deny relief in equity, where the decisions at law can not cover the entire controversy. The bill would lie as to all the lands not contracted to R and O, and may properly embrace the rest in the decree prayed for, so as to terminate the entire controversy. Woods v. Monroe, 17 Mich. 238. 2. Complainant claims, under a deed dated June 1, 1834, acknowledged May 25, 1837. Between these dates the grantee died, and there is no direct satisfactory evidence that he had possession of the deed at all. *Held*, that the presumption that when the date of acknowledgment is subsequent to the date of the deed, the former, rather than the latter, is the date of delivery (Blanchard v. Tyler, 12 Mich. 339; Johnson v. Moore, 28 Id. 3), is liable to be overcome by circumstances inconsistent with the supposed fact. An acknowledgment by the grantor, after the grantee's death, so as to perfect for record his previously delivered deed, is more probable than that the grantee's representation, to save expenses sought to close up an unfinished transaction by having a deed completed to the deceased grantee, which, unless delivered before the death, would be a mere nullity. 3. Defendant claims under a subsequent deed from the same grantor, but which was recorded before that under which complainant claims. Defendant's deed purports "to grant, bargain, sell, release and forever quit claim unto the parties of the second part, and to their heirs forever, all the right, title and interest of, and now remaining in the party of the first part of, in and to all that piece or parcel of land," etc., "known as the Mullett farm;" complainant's prior deed was of a large part of said farm. *Held*, that defendants' deed did not convey the land in dispute. Where a deed describes land by metes and bounds, or otherwise, and purports to convey it, the grantee, if a purchaser for value, without actual or constructive notice of previous conveyances, is entitled to claim what is described; but when one receives a conveyance of a "remaining" interest, the description itself limits the operative words to the interest remaining unconveyed. The deed, though recorded, defeats no prior unrecorded conveyance, because it is not a second conveyance of anything previously conveyed. Both deeds may well stand together. Opinion by COOLEY, J.—*Eaton v. Trowbridge.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1878.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, }
" D. J. BREWER, } Associate Justices.

A RESIDENT, CITIZEN AND TAXPAYER of a city is incompetent to serve as a juror in an action wherein the city is sued for ten thousand dollars damages. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*Gibson v. City of Wyandotte.*

PARTNERSHIP — ACCOUNTING. — In an action brought by one member of a partnership to have an accounting with his two partners, and to recover a balance due him, where the referee reports that such plaintiff contributed $663.48 to the capital, and the other two partners $370.00, and that certain profits were realized from their business, and that, by the terms of the partnership, the parties were to share equally in the profits thereof: *Held*, that each member of the firm, on dissolution of the partnership, is entitled to a return of his capital, and, in addition, one-third of the profits. Opinion by HORTON, C. J. Modified. All the justices concurring.—*Norman v. Conn.*

ASSIGNMENT—ASSETS OVER LIABILITIES — COMPOUNDING THE INDEBTEDNESS.—Where an assignment is made by a firm whose liabilities are $596.41, and whose assets are $614.18, to an assignee in trust for the creditors, which contains the following special clause, viz.: The assignee shall take possession of the property transferred to him, sell and dispose of the same with all reasonable diligence, either at public or private sale, for the best prices that can be obtained therefor, and to convert the same into money, *unless the indebtedness of the firm can be paid or settled otherwise by amicable arrangement between the creditors of the firm*, etc., * * * * and out of the proceeds of such sale, *if any be made*, etc., * * * * *Held*, that the assignment is void. Opinion by HORTON, C. J. Reversed. All the justices concurring.—*Keevil et al. v. Donaldson.*

PARTIES — ADOPTING OTHERS' CONTRACTS. — 1. Where the old firm of A & B sold out to the new firm of B & C, and B & C executed to them in consideration of $200 an agreement to pay their debt for wheat to one O: *Held*, O could adopt such written agreement as to his own, although he was not originally a party to it, and could maintain action thereon against B & C to recover $176 due him for wheat delivered before its execution to A & B. Anthony v. Herman, 14 Kas. 494: K. P. Rly Co. v. Hopkins, 18 Kas. 494. 2. In an action by O against B & C to recover on such an agreement, O thereby adopts the same as his own, and the court commits no material error in refusing to compel O on cross-examination to answer whether there was an agreement between him and A of the old firm of A & B, that he should sue B & C and make his money, if he could, and A would pay half of the attorney's fee. Opinion by HORTON, C. J. Affirmed. All the justices concurring.—*Floyd et al. v. Ort.*

CONDITIONAL SALE OF CHATTEL—RIGHT OF REMOVAL.—1. Where A making a conditional sale of a chattel to B, stipulates in the contract that the title shall remain in A until payment of the price, that upon non-payment possession shall be restored to him, and that it shall not be removed from a given place, finds that without his knowledge or consent B has sold the chattel to C, who has removed it many miles from the said place, he may, before the expiration of the time for payment, recover the possession in an action of replevin. 2. Where A in such case states to G that he is the owner, and that it was not to be removed from the specified place, and C replies that he has bought it from B, that he would keep it, and would not give it up; *Held*, that this was sufficient demand, if demand were necessary before action. Opinion by BREWER, J. Reversed. All the justices concurring.—*Hall v. Draper.*

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

30. A. IS AN EXECUTOR OF A WILL, and also the trustee of an express trust raised by the will. By the terms of the will A is required to set apart from the funds of his testator's estate a specified sum and hold it in trust for a certain period of time. A settles up the estate, and makes a final settlement of his accounts, but utterly fails to set apart this sum required by the will. He is insolvent and a non-resident of this state. The legatee under the will or *cestui que trust* (if the trust had been established), is also a non-resident of this state. In an action in the United States Circuit Court to set aside A's final settlement and discharge his accounts, are the sureties on his bond proper parties defendant, and will the residence of his sureties within this state give the United States Circuit Court for this district jurisdiction of the case, or will the action have to be brought in the United States Circuit Court for the state in which A resides? Does the case of Hoak v. Payne, 7 Wall. 425, cover the above point fully?

E. H.

BOOK NOTICE.

CASES ARGUED AND DETERMINED in the St. Louis Court of Appeals, of the State of Missouri. Reported by A. MOORE BERRY, official reporter. St. Louis, Soule, Thomas & Wenthworth. 1878.

The St. Louis Court of Appeals has earned a reputation for its judgments which is possessed by no other court not of final result in the country, and by but few even of the highest courts. It had been in existence for some time before any provision was made for reporting its decisions in an official and permanent form, and, during that time, when any of its opinions were given to the profession at large, it was through the columns of this JOURNAL. We have rarely printed in full an opinion of this court which has not been copied into every law journal in the land from Massachusetts to California. The number of novel and interesting questions of law which have come before the St. Louis Court of Appeals since its organization, would appear more than remarkable were it not remembered that it sits in judgment on the litigation of a metropolis—that before it come cases from three populous counties, and from a city the fourth in population on the continent.

A reporter's work is not in these days what it used to be. He is not required to sit through the arguments of counsel and record them; to listen to the delivery of judgments from the bench and take them down as best he can; to reconcile the statements of the opposing advocates, and the queries and interjections of the judges, and from the whole evolve an accurate and intelligible report. The old reporters had to keep their eyes open. "We come, my lord," said Mr. Preston, in an argument one day before Lord Lyndhurst, "to the important case of Elliott v. Merryman, on which conveyancers have at all times relied as very material to the law affecting the case now before the courts, which is in Barnardiston's reports." "Barnardiston, Mr. Preston," exclaimed the chancellor. "I fear that is a book of no great authority. I recollect in my younger days it was said of Barnardiston that he was accustomed to slumber over his note book, and the wags in the rear took the opportunity of scribbling nonsense in it." How closely the old judges scrutinized what pretended to be the record of the judgments of their predecesors, may be seen from this conversation. But it may be said that Barnardiston's was an exceptional case; and so it was. Criticisms and complaints from the bench concerning the reporters and the reports were seldom heard, for occasions seldom offered themselves. The two Veseys, Beaven, Crompton, Welsby and Hurlstone, made a name in their department hardly less distinguished than the judges whom they reported, and by the profession the work of the reporter was regarded as only second to the labors of the judge. In this country, the same may be said of such distinguished reporters as Pickering, Gray and Sumner.

But the times have changed. Singularly enough, with the increasing labors of the judges, the result of an increase of population, and, consequently, an increase of litigation, two-thirds of what was formerly the work of the reporter has been shifted from him and transferred to the bench. A judge must prepare his opinion in writing, as he wishes it to appear in print—in some states he must likewise prepare a syllabus to each opinion he writes. It will be thus seen that what is left for a reporter to do under the present system is not onerous. All that he is called upon to perform, and which, if done properly, the profession will have nothing to complain of, is to make his syllabi clear and comprehensive, his index accurate and systematic, and the cases themselves intelligible. We can not but think that it will be the conclusion of the profession of this city and state that the first reporter of the St. Louis Court of Appeals has thus far performed even these easy duties in a manner which is very far from satisfactory.

To make a complete report the reporter should be careful to supply, by an examination of the record, any facts in the case which the judge may have omitted from the opinion. It is also of very great importance to the profession that the arguments of counsel should be presented. This may be done either briefly or elaborately as the nature of the argument, and the importance of the case may suggest. Generally, it will be sufficient to indicate at no great length the points made by counsel and the authorities cited, in order that the reader may understand the arguments relied on by each side, and their relative prominence in the consideration of the case. But Mr. Berry, we had almost said has neglected this feature altogether. Perhaps it would have been better if he had done so, or if the opinions which appear in this volume had gone straight from the hands of the judges to those of the publisher. We would then have been spared the disappointment which every reader of this and the former

volumes must feel when he turns over their leaves and finds that he has paid for such pages as—to take a few out of many—pages 23, 24, 300, 301, 302, 593, 594 and 595, of the first, or 96, 97, 282, 283, 353, 384 and 433 of the second volume.

It has been part of our duty for some time to critically examine the legal publications of the country, and to indicate to the best of our ability and for the benefit of those who must buy law books, what we considered to be the merits and demerits of particular publications on the law of the land. In this position it has been our privilege to see many able works and many poor ones. Yet we do not recollect ever having seen a single page in any of them so absolutely worthless for the object which they pretend to serve as the pages we have just referred to. And pages quite as bad as those we have cited are to be found in every part of both volumes. The way it is done is as follows: The name of the counsel for the appellant is given, and then without more there follows a string of authorities extending over one or two pages; then the name of appellee's counsel, and again a string of authorities. No idea is given as to what question the authorities decide, or were cited to affect. There may have been a dozen different points argued; it is all the same to the reporter. All the same to him, it appears, if the first two or three should be found on investigation to sustain a question of practice, the next half dozen a question of evidence, and the rest every subject that a lawyer can name from a question of criminal law to a point in constitutional law. But Mr. Berry probably understood that no one would ever attempt to find out what this jumble of cases which precede the opinions of Judges Gantt, Lewis and Bakewell in these two volumes of reports really refer to. They resemble, when one comes first to look into them and next at them, the panic which sometimes seizes an army and throws into one struggling mass, cavalry, artillery and infantry, generals, privates and camp-followers. But might we not well assume that our simile is unnecessary, and that what we are criticising is really the result of the panic which took hold of the reporter when he entered upon a work which these volumes sufficiently show he so little understood?

We have not obtained the opinion of the members of the bar as to the manner in which these volumes have been compiled. Ours is an independent criticism which is uninfluenced save by a regard for the wants as well as the rights of the profession. We shall be surprised, however, if their judgment does not coincide with the conclusion we have been forced to, after an examination of the two first volumes of these reports—that they are not what the profession of this state and more especially the bar of this city had reason and the right to expect. Personally we have this slight interest in the subject and no more—that in observing that of almost every case which has appeared in the columns of this journal the reporter has appropriated our syllabi without permission and without credit, we find that we have helped to edit these volumes, and therefore feel somewhat responsible for their shortcomings.

The second volume contains 641 pages. The cases therein included were decided between April 10 and July 31, 1876—over 100 in all. The book is handsomely printed on excellent paper and well bound, and in all other respects except those we have spoken of and which we cannot help regarding as radical, is a credit to the court and the publishers.

NOTES.

Ex-Judge Murray Hoffman died at Flushing, N. Y., on the 7th instant, at the age of eighty-five years. He was a graduate of Columbia College, studied law and was admitted to the bar in 1812. He was assistant Vice-Chancellor from 1839 till 1843, and Justice of the Supreme Court of New York from 1853 to 1861. He is more widely known, however, as an author of law books. His principal works are "Office and Duties of Masters in Chancery," published in 1842; a "Treatise on the Practice of the Court of Chancery," a work in three volumes, published in 1840-43; an important work called a "Treatise on the Corporation of New York as Owners of Property, and Compilation of the Laws Relating to the City of New York"; and "Vice-Chancery Reports," which appeared in 1839-40.

In the matter of legislation, the past week has more to record than usual. Two bills have been passed by the New York assembly and senate—in each case almost unanimously—which deserve to be noticed as being, in the one case, an attempt to surmount a constitutional provision which works much injustice, and in the other to make a radical change in one of the best established rules of the common law. The first bill "To protect the rights of citizens of this state holding claims against other states," provides that citizens of that state holding claims against other states—like repudiated bonds—may assign them to the state and have the Attorney-General bring a suit for their payment in the United States Supreme Court; all the expenses of such suits to be borne by the holder of the claim. The second bill to which we refer is an act in relation to devises, and provides that no person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, missionary or social society or corporation, or to any eleemosynary society or corporation whatever, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and the lawful expenses of administration. And such devise or bequest shall only be valid to the extent of such one-half and no more; and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator.

Among the offices which pertain to the English bar, and whose existence are forgotten until they happen to fall vacant by the death of their occupants, and the appointment of others to fill the vacancy gives them for a time an unaccustomed prominence, are those of Postman and Tubman to the Exchequer Division of the High Court of Justice. The other day the office of Postman falling vacant, and a Mr. Anstie being nominated to the position, the *Solicitors' Journal* takes occasion to remark that the origin of these almost unheard of offices appears to be difficult to trace. Within the Exchequer Court the gentlemen who hold these positions have, according to Price, pre-audience, the one of the Attorney the other of the Solicitor-General, in all ordinary business. In 1840, in the case of R. v. Bishop of Exeter, 7 M. & W. 188, the Postman claimed precedence of the Attorney-General; but upon the Attorney-General's stating that it was the Queen's business in which he moved, the court decided that he was entitled to be heard before the Postman. The Postman and Tubman are said to be so named from the places they occupy in the court, the Postman having his "post" on the left extremity of the first row of the outer bar (the right of the bench), and the Tubman being seated in a box or "tub" on the right extremity. They are always members of the outer bar, and are nominated by the Lord Chief Baron by word of mouth in open court, but have no rank or privilege beyond its precincts. 9 Foss's Judges, 110. Among the names of former holders of the offices are those of Chief Justice Jervis, Lord Penzance, Justices Thesiger, Crompton, Willes and Lush.